



U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel
Report of Prohibited Personnel Practice
OSC File No. [NSF]

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I. INTRODUCTION

This report contains the U.S. Office of Special Counsel's (OSC) investigative findings in a complaint of prohibited personnel practice involving the National Science Foundation (NSF). Specifically, Complainant alleges that the NSF retaliated against him after it perceived him as a whistleblower and as engaged in protected activities under the Whistleblower Protection Act.

Briefly, Complainant's supervisor recommended his selection for a career appointment in a supervisory position. Thereafter, Complainant's supervisor stated that NSF senior leadership influenced him to change his recommendation from a career appointment to a term appointment because they were concerned about Complainant's history of bringing allegations to the Office of the Inspector General (IG). As a result, Complainant served a three-year term appointment in the position.¹

A few years later, Complainant made a protected disclosure that led to multiple investigations and significant criticism of NSF. Following Complainant's disclosure, some NSF staff openly lobbied for his termination. At the end of Complainant's term appointment in the supervisory position, Complainant's supervisor again recommended him for a career appointment to the same position. Complainant's supervisor wrote a memorandum describing Complainant as the best candidate for the position and extolling his abilities. After a meeting with a member of NSF's senior leadership who raised questions about whether Complainant could be trusted, Complainant's supervisor withdrew his initial memorandum and submitted another memorandum selecting an external candidate. [REDACTED]

OSC concludes that Complainant's term appointment and his later non-selection [REDACTED] were in retaliation for protected whistleblowing and activity in violation of 5 U.S.C. § 2302(b)(8) and (b)(9), respectively.

II. STATEMENT OF FACTS

At all relevant times, Official 1 was Complainant's supervisor. Officials 2, 3, and 5 were also in Complainant's chain of command.

A. Official 1 Recommends Complainant for a Career Appointment in a Supervisory Position, but NSF Leadership Rejects His Recommendation

After NSF announced a supervisory position, seven candidates, including Complainant, applied. NSF rated Complainant and two other candidates as "highly recommended." A selection panel interviewed these three candidates and sent their scores to Official 1, who was the selecting official.

¹ The appointment was for a two-year term, with an extension for a year.

Official 1 recommended Complainant for a career appointment to the position in a signed memorandum. The memorandum also stated that Official 1's recommendation of Complainant for the position was "enthusiastic[] and unreserved[]." Official 1 told OSC that it was his intent to appoint Complainant to give a appointment to Complainant, but his supervisors did not support the appointment. Official 1 stated:

I went to Officials 2 and 3 with my recommendation and they pushed back on it, in part because of the intense pressure that they were receiving from other people in the division. I didn't ask specifically who, but I knew part of it came from [REDACTED] [REDACTED].... I didn't push back. I said I know I want this individual and if I can't get him as a permanent, I'll get him as a three-year because there is a strong likelihood that he would do a great job and I would, you know, when the time comes to reappoint him, he would demonstrate he could act in this position with great skill and accomplishment....

Official 1 explained that Officials 2 and 3 did not want Complainant given a career appointment to the position because of Complainant's relationship with the IG. According to Official 1:

[People in NSF] thought he would go behind people's backs to do things that were inappropriate. One part of that, although it didn't weigh particularly heavily in my decision because it was not relevant, was just the notion that he had a history, in the past, of going to the Inspector General's office with complaints on things. That wasn't to say don't select him because he does that, but you'll find yourself getting into a number of problems if he's selected because he has a tendency to do that. And that was the sentiment. It wasn't just, again, I can't identify specific people, because I don't want to misrepresent my memory but I know Officials 2 and 3, there was a conversation with them concerning that.

Official 1 also testified that Officials 2 and 3 expressed a concern that Complainant "is someone who runs to the IG or the General Counsel if there is an issue about something," and that Complainant had a "habit" and "track record of doing that and that'll lead to all sorts of problems for you." Official 1 stated that he could not recall "exact words," but that both Officials 2 and 3 expressed the same concern. Official 1 recalled that Officials 2 and 3 asked him to rewrite his recommendation to be for a limited term appointment. Accordingly, Official 1 drafted a second memorandum. It was identical to the earlier memorandum, but rather than recommending Complainant for a career appointment to the position, it recommended him for a limited term appointment to the position.

In his interview, Official 2 told OSC that Complainant "was connected with the IG's office. I remember that that was sort of known, that he would go there regularly." Official 2 recollected that he spoke with Official 1 about Complainant's selection, but could not recall the content of that conversation. Similarly, Official 3 indicated that Complainant was associated with the IG, stating, "I've never seen him personally at the IG's office myself, you know, but the rumor mill is that he is tight with the IG." Official 3 told OSC that while it was her practice to

speak to a selecting official about a selection, she could not recall speaking with Official 1 about his selection of Complainant.

While Officials 2 and 3 did not remember the specific conversations or the memorandum recommending Complainant's selection for a career appointment to the position, the related routing slips appear to corroborate Official 1's recollection that he discussed selecting Complainant for a career appointment with his superiors. A routing slip denotes that it is associated with a "Selection Memo for [REDACTED] Candidate – [Complainant] Selected." Official 1 initialed the routing slip. The slip indicates approval by "Official 3, [REDACTED]" is required; however her signature field is empty. In a second version of the routing slip, the word "Career" has been crossed out and replaced with "limited-term" in handwriting. Official 3 approved this version.

Email traffic between Official 1 and Complainant also confirms events surrounding the change in Complainant's appointment from career to term. Complainant and Official 1 spoke about Complainant's appointment. Then Complainant sent Official 1 an email with the whistleblower protection laws, including the protections against retaliating for whistleblowing and engaging in protected activity, and stated:

This is what concerns me about senior managers considering cooperation with the IG in hiring and promotion decisions. We are required to cooperate with investigations despite how we personally feel. The consequences of holding such involvement against employees and applicants are not trivial.

Three days after Complainant's email to Official 1 with the whistleblower protection laws, Complainant sent an email to Official 3. In his email, Complainant included NSF's policy on cooperating with the IG and told Official 3, "Ironically, I ran across this as I was cleaning files today." Official 3 responded, "Well, I certainly hope we have complied with this."

Ultimately, NSF offered Complainant a two-year term appointment to the position, with the possibility of a third-year extension.

B. NSF Employees Attempt to Have Complainant Terminated After He Makes a Disclosure

Complainant discovered that Employee A may have a conflict of interest related to a number of projects assigned to Employee A. Complainant spoke to Official 1 about the conflict, and afterwards, Complainant and Official 1 met with Employee A. Complainant and Official 1 also brought the matter to the attention of Official 3 and Official 4. Subsequently, Official 4 sent Official 3 an email saying Employee A's conduct appeared to violate government ethical standards and regulations:

[REDACTED]

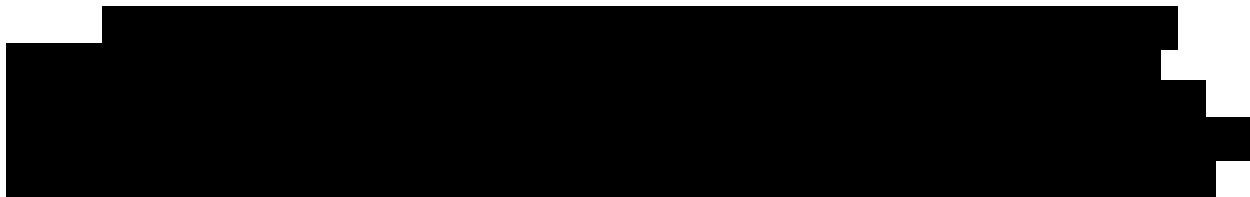


Official 4 recommended that NSF pursue various courses of action to remediate this issue, including one option that ultimately led to Employee A's departure from NSF.

After Complainant's disclosure, some officials complained about him to NSF management. Additionally, officials targeted him, and planned to strike back against him.² To illustrate, officials exchanged emails talking about a plan of action that included "go[ing] after" Complainant. In addition, Official 5 described an email he received as "trying to get [Complainant]."

C. Complainant's Disclosure Leads to Criticism for NSF

An individual who formerly worked at NSF sent an email, with an attached letter, to Official 3 and others following Complainant's disclosure. The letter referred to Complainant 16 times, blamed him for Employee 1's departure, and described his conduct as "utterly reprehensible." A group of former individuals who had previously worked at NSF also contacted Official 5 and requested an investigation into the circumstances of Employee A's departure. Further, Official 5 testified that when he attended a scientific community meeting, an individual "accosted" him and told him that he should "remove" Complainant from employment.



Official 5 stated that he and others at NSF were concerned about the various criticisms because it may have "injured our ability to recruit."

Despite the upheaval surrounding Complainant's disclosure, Officials 1, 3, and 5 did not address the perception among [redacted] employees that Complainant had done something wrong. Official 5, [redacted]

[redacted] to being "hit by a mac truck." He also described the

² In a later development, after IG investigations and findings, NSF proposed action against these officials, who all subsequently left NSF.

discord among the staff as “totally unprofessional,” “us versus them and when I found that out I was horrified,” and a “huge division between [REDACTED] and [REDACTED].”

In interviews with OSC, Officials 1, 3, and 5 all professed that they found nothing inappropriate in Complainant’s disclosure. However, none of these officials communicated this belief to the rest of the [REDACTED] staff. Official 5 felt he could not defend Complainant without discussing information [REDACTED] that he was prohibited from sharing. Official 3 claims she communicated support of Complainant in private. Official 1 told others [REDACTED] that he could not discuss [REDACTED] and did not provide any information about Complainant’s actions.

D. Official 1 Again Recommends Complainant for Appointment to a Supervisory Position, but NSF Leadership Rejects His Recommendation

Following NSF’s announcement of the supervisory position vacancy, Human Resources determined that 15 applicants were eligible. Five of these applicants, including Complainant, were designated as either “recommended” or “highly recommended.” Official 1 used a panel as part of the selection process. This panel prepared a report that did not rank the candidates. Rather the report discussed the positive and negative aspects of each candidate. Official 1 testified that he did not find the report helpful in the selection process because it neither ranked nor differentiated the candidates in any meaningful way.

Eventually, Official 1 recommended selecting Complainant for a career appointment to the position. Official 1 emailed Official 5 a memorandum seeking approval to hire Complainant. The memorandum named Complainant and another NSF employee as the top two candidates. Official 1 stated, “after reviewing and giving careful consideration to the [panel] memo, staff written and verbal opinions, references and my own interactions with the candidates, in my opinion, only two were highly-suited for this position: [another NSF employee] and Complainant.” The memorandum explains why Complainant was the superior candidate, stating:

[REDACTED]

Official 1 also praised Complainant’s communication abilities by stating that Complainant possessed a “skillful ability to communicate” as well as to “foster an environment of inclusiveness across the foundation.” Official 1 declared that Complainant “focuses on not only [REDACTED] achieving high quality results, but also on ensuring that the process to achieve those results is fair and of the highest standards.” Official 1 commended Complainant’s [REDACTED]

[REDACTED] Further, Official 1 asserted:



Official 1 concluded the memorandum by “recommend[ing] enthusiastically” Complainant’s selection for the position.

In his selection memorandum, Official 1 mentioned no trust issues regarding Complainant, nor did he identify any problems with Complainant’s performance or conduct in the position during the prior three years. The performance evaluations NSF provided show that during Complainant’s tenure, Official 1 rated Complainant’s performance as “Exceptional,” the highest rating possible.

Official 1 also began drafting another selection memorandum around the same time that he drafted the memorandum selecting Complainant.³ This draft memorandum recommended the selection of the other internal NSF candidate, and again listed Complainant as the only other candidate that is “highly-suited” for the position. In his interview with OSC, Official 1 described the second memorandum as “almost like a fully drafted memo.” A copy of the memorandum shows that it included extra spacing between paragraphs, and erroneously referred to Complainant in multiple places instead of the other internal candidate. For instance, the memorandum talks about “[Complainant’s] effectiveness ...,” “[Complainant’s] stature ...,” and “Complainant’s accomplishments....”

Official 1 told OSC that at the time he drafted the first two memoranda described above, he had “not begun much in the way of drafting” a memorandum selecting the eventual selectee, nor did Official 1 list the eventual selectee in either memorandum as one of the two candidates “highly-suited for this position.” Official 1 did not email any other selection memorandum to Official 5 other than that selecting Complainant prior to meeting with Official 5 a few days later.

When Official 1 and 5 met to discuss Official 1’s selection of Complainant, Official 1 recalled Official 5 telling him to ensure he had considered whether he could trust Complainant. When asked by OSC to elaborate on what Official 5 may have meant about trusting Complainant, Official 1 pointed to Complainant’s reputation for spending time on the 12th floor, where the IG is located. Official 1 stated:

I can’t quite see [Complainant] hovering around the 12th floor. But, you know, there was a statement made to me that’s the sort of thing that’s going on. [Complainant] would make end runs around you if he doesn’t see it as getting

³ Official 1 said he drafted the memorandum to determine whether he could write down the information and be comfortable since he would have to make a case to Official 5 and he wanted to make sure that he had “considered the pros and cons.”

what he wants he is going to do something to get it and it doesn't matter if its someone that he's worked with he'll make the end run if he feels like he has to do that, whether it's you know going to the 12th floor or going to the front office on concerns. I don't look at those as issues that concern me because I felt I have accorded myself appropriately ... but I know people have those concerns.

Official 1 further testified about the "trust issue" during his meeting with Official 6, stating:

[REDACTED]

.... [Official 5] talked about issues of trust and he said [REDACTED] he'd known about the reputation that [Complainant] had had. That's probably the cleanest way to say it without you know trying to recall specific details about it, but the trust is something that I did talk to him about, and he said you've just got to consider it.

According to Official 5, during the meeting, he and Official 1 also discussed the idea that some NSF staff were "nervous" about Complainant. [REDACTED]

Moreover, Official 5 told OSC that "some people fear that again if they did something wrong [Complainant] was going to walk straight up to the Office of the Inspector General [REDACTED] and that is the rep he has ..." Additionally, Official 5 stated that "there is a lot of truth that [Complainant] rubs shoulders with the IG." [REDACTED]

Official 5 recalled directly questioning Official 1 on whether he could trust Complainant during the meeting discussing Complainant's selection for the position, asserting:

I finally asked [Official 1], I said, "[Official 1] do you trust [Complainant] one hundred percent in fact I'll say two hundred percent" and I remember [Official 1] pausing and pausing and pausing and he says, "I don't think I can tell you I do." And I think I told [Official 1], "I think you know where you are going, but it's your decision."

Officials 1 and 5 also discussed an incident in which they speculated that Complainant had obtained some information in an inappropriate manner. While Official 1 was not certain

how Complainant got the information, he said that speaking to Official 5 “opened my eyes that I really have to think about things carefully and just use common sense.”

[REDACTED]

After leaving Official 5’s office, Official 1 decided that he was “probably not going to” select Complainant for the position. Official 3 recalled speaking to Official 1 shortly after his meeting with Official 5. She described Official 1’s demeanor as “deflated” and “frustrated.” Based on her conversation with Official 1, Official 3 believed he was disappointed because he had intended to select Complainant. Official 1 could not recall this conversation.

After the meeting with Official 5, Official 1 completed another selection memorandum. Although Official 1’s first memorandum listed the top two candidates as Complainant and another NSF employee and made no mention of an external candidate, Official 1’s new memorandum listed an external candidate as the top choice and Complainant and the NSF employee as the next best candidates. Official 1 attributed the change to his coming to prefer the idea of hiring someone from outside NSF. As he described it, he had a “gut” feeling that it would be better to hire an outsider. NSF then selected the external candidate for the position.

[REDACTED]

II. LEGAL ANALYSIS

NSF violated section 2302(b)(8) and (b)(9) when it changed Complainant’s appointment from a career appointment to a term appointment. NSF also violated section 2302(b)(8) and (b)(9) when a few years later it did not select Complainant for the position [REDACTED]. We address these violations below.

Section 2302(b)(8) prohibits whistleblower retaliation for making a disclosure that evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Section 2302(b)(9) prohibits whistleblower retaliation for engaging in protected activity, e.g., cooperating with or disclosing information to an IG. To establish a *prima facie* case of whistleblower retaliation under section 2302(b)(8) and (b)(9)(A)(i), (B), (C), and (D), OSC must show by a preponderance of evidence that: (1) an employee made a protected disclosure or engaged in protected activity or was perceived as making a protected disclosure or engaging in

[REDACTED]

protected activity; (2) the agency took or failed to take a personnel action against the employee; (3) the officials taking the personnel action knew of the protected disclosure or activity; and (4) the protected disclosure or activity was a contributing factor in the personnel action. *See* 5 U.S.C. § 1214(b)(4)(B)(i); *see also Webb v. Dep't of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015). Once OSC establishes a *prima facie* case of whistleblower retaliation, the burden shifts to the agency to show by clear and convincing evidence that it would have taken the same actions in the absence of the protected disclosure or activity. *See* 5 U.S.C. § 1214(b)(4)(B)(ii).

A. NSF Violated Section 2302(b)(8) and (b)(9) when it Changed Complainant's Appointment to a Supervisory Position from Career to Term

1. OSC Established a *Prima Facie* Case of Whistleblower Retaliation

NSF perceived Complainant as a whistleblower and as engaging in protected activity. NSF officials discussed this perception at the time they considered Complainant's selection. An employee is protected against whistleblower retaliation when the agency fears or perceives him as making a protected disclosure or engaging in protected activity. *See CortHELL v. Dep't of Homeland Sec.*, 123 M.S.P.R. 417, 421-24 (2016) (demonstrating that section 2302(b)(9) covers perceived protected activity); *Mausser v. Dep't of the Army*, 63 M.S.P.R. 41, 44 (1994) (employee is entitled to whistleblower protection if official perceived him as a whistleblower); *Special Counsel v. Dep't of the Navy*, 48 M.S.P.R. 274, 280 (1990) ("protections provided in 5 U.S.C. § 2302(b)(8) apply where a retaliatory personnel action is taken against an employee believed to have engaged in protected activity even though the employee may not have actually done so"); *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 605-06 (1984) *rev'd on other grounds*, *Harvey v. MSPB*, 802 F.2d 537 (D.C. Cir. 1986) (finding an agency committed a prohibited personnel practice against an employee who had prepared, but not yet made, a disclosure).

Official 1 asserted that after he prepared his recommendation to select Complainant for a career appointment to a supervisory position, he spoke with Officials 2 and 3 and they pushed back on his recommendation. Official 1 stated that both Officials 2 and 3 indicated that Complainant had "a track record" of going to the IG or "the General Counsel if there is an issue about something" and that this behavior will "lead to all sorts of problems for you." Official 1 further testified that Officials 2 and 3 asked him to rewrite his recommendation for it to be a limited term appointment instead of the original recommendation of a career appointment.

The evidence garnered in OSC's investigation supports Official 1's recollection. While Officials 2 and 3 were unable to recall any conversation about the hiring action, both confirmed that Complainant had a reputation for going to the IG. Additionally, the selection memoranda, and their associated routing slips, are consistent with Official 1's recollection. Moreover, two emails sent by Complainant to Officials 2 and 3 demonstrate his specific concern about NSF leadership improperly taking employees' cooperation with the IG into account in hiring and promotion decisions.

NSF took a personnel action against Complainant when Official 1 changed Complainant's appointment to the position from career to term. *See* 5 U.S.C. § 2302(a)(2)(A)(i) (showing that an appointment is a personnel action).

In terms of causation, Official 1's discussion of Complainant's penchant for going to the IG or the General Counsel with Officials 2 and 3, and then changing his selection recommendation afterwards demonstrates that Complainant's perceived whistleblowing was a contributing factor in the appointment. *Dorney v. Dep't of the Army*, 117 M.S.P.R. 480, 486 (2012) ("Any weight given to a whistleblowing disclosure, either alone or in combination with other factors, can satisfy the contributing factor standard.") Additionally, a mere two weeks passed between Official 1's first memorandum, his discussions with Officials 2 and 3, and his second memorandum changing his appointment recommendation from career to term. This short time frame meets the "knowledge-timing test" for showing that the perceived whistleblowing was a contributing factor in the personnel action. See 5 U.S.C. § 1221(e)(1); see also *Schnell v. Dep't of the Army*, 114 M.S.P.R. 83, 93 (2010) (personnel action taken within one to two years of disclosure shows causal connection); *Gonzalez v. Dep't of Transp.*, 109 M.S.P.R. 250, 259 (2008) (finding that disclosure made slightly over a year before personnel action met contributing factor test).

2. NSF Cannot Show that It Would Have Changed Complainant's Appointment Absent his Protected Disclosure and Activity

Because OSC has shown a *prima facie* case of whistleblower retaliation, NSF must show by clear and convincing evidence that it would have taken the same actions absent Complainant's perceived whistleblowing and protected activity. Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations sought to be established." See *Gergick v. GSA*, 43 M.S.P.R. 651, 663 (1990); 5 C.F.R. § 1209.4(e). Three factors are relevant to determine whether NSF can meet the clear and convincing standard: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. See *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). These factors are not discrete elements, but are weighed together to determine whether the evidence is clear and convincing as a whole. See *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012); *Mithen v. Dep't of Veterans Affairs*, 122 M.S.P.R. 489, 505 (2015). NSF cannot meet the clear and convincing evidence standard.

First, NSF does not have strong evidence to support the change in Complainant's appointment from career to term. Indeed, the testimony and documents demonstrate that the reason Complainant was not hired for a career appointment was because of his perceived whistleblowing and protected activity. Specifically, Official 1 testified that Officials 2 and 3 warned him about Complainant's reputation for going to the IG or the General Counsel. Official 1 also stated that Officials 2 and 3 asked him to change his written recommendation for Complainant's appointment from career to term. Official 1 explained that he told Officials 2 and

3 that he wanted Complainant in the position and if he could not get him on a career appointment, he would select him on a three-year term appointment.⁵

Second, NSF's fear that Complainant would go to the IG or the General Counsel with issues evidences a motive to retaliate. Official 1 testified that Officials 2 and 3 were concerned that Complainant's tendency to go to the IG or the General Counsel was going to "lead to all sorts of problems."

Third, the evidence shows that NSF has not ordinarily changed the recommended appointments of similarly situated employees who were not actual or perceived whistleblowers. Although NSF routinely made appointments to like positions, only on one other occasion did a selecting official—who was not Official 1—change an appointment from career to term.⁶ The employee in that sole instance was not similarly situated to Complainant. In that case, NSF changed a [REDACTED] appointment from career to term after [REDACTED].

[REDACTED] There was no such prior rejection when Complainant's appointment was changed. Generally, for an employee to be considered similarly situated, "all relevant aspects of the ... employment situation must be nearly identical to those of the comparative employee." *Cf. Goodwin v. Dep't of the Air Force*, 75 M.S.P.R. 204, 209 (1997). The existence of a previous rejection [REDACTED] is a relevant and material aspect because it provides an independent rationale to change an appointment from career to term. Thus, there is no evidence that a similarly situated employee had his appointment changed from career to term.

Weighing the *Carr* factors together, we conclude that, given the paucity of evidence supporting this personnel action, the strong motive to retaliate, and that similarly situated non-whistleblowers are not treated in the same way, NSF cannot demonstrate by clear and convincing evidence that it would not have selected Complainant for a career appointment absent his perceived whistleblowing.

B. NSF Violated Section 2302(b)(8) and (b)(9) When It Did Not Select Complainant for a Supervisory Position

1. OSC Can Establish a *Prima Facie* Case of Whistleblower Retaliation

Complainant made a protected disclosure when he reported his reasonable belief that Employee A violated government ethical standards and regulations related to conflicts of interest. *See* 5 U.S.C. § 2302(b)(8); *see also Tullis v. Dep't of the Navy*, 117 M.S.P.R. 236, 240 (2012) (reasonableness of a disclosure is objective: could a disinterested observer with knowledge of the

⁵ NSF cited other reasons it may have changed Complainant's appointment from career to term. For example, NSF mentioned [REDACTED]

[REDACTED] However, none of the relevant selecting officials cited these concerns in their interviews with OSC, nor is there evidence that such considerations were a factor.

⁶ Although NSF did not provide a precise number of appointments in a five-year period, it stated that there were "approximately [REDACTED] different positions ... [s]ome of which were filled every 3 years."

essential facts known to and readily ascertainable by the employee reasonably conclude that the information evidences an impropriety defined in the statute). Official 4 agreed that Employee A's conduct raised a conflict of interest and recommended that NSF take remedial actions, which led to Employee A departing NSF. Additionally, as discussed earlier, Complainant had developed a reputation within NSF for his contacts with the IG and the General Counsel, [REDACTED]

[REDACTED] Thus, even apart from his actual whistleblowing, Complainant was perceived as making protected disclosures and engaging in protected activity. *See* 5 U.S.C. § 2302(b)(8) and (b)(9).

NSF took several personnel actions against Complainant. Despite initially recommending Complainant for the position and writing a laudatory memorandum extolling Complainant's exemplary skills and abilities, Official 1 changed his decision and did not recommend Complainant for appointment. *See* 5 U.S.C. § 2302(a)(2)(A)(i) (showing that an appointment is a personnel action). [REDACTED]

In terms of causation, NSF officials involved in the hiring decision knew of Complainant's disclosure, as well as his reputation for going to the IG and the General Counsel. Specifically, Complainant told Official 1 about Employee A's conflict of interest. Official 5 learned of Complainant's disclosure because, among other things, NSF employees complained to him about it. In addition, Official 5 received a letter from an individual who formerly worked at NSF. This letter referenced Complainant 16 times and blamed him for Employee A's departure, and another person who had previously worked at NSF told Official 5 he should "get rid of" Complainant. [REDACTED]

[REDACTED] Officials 1 and 5 knew of Complainant's disclosure about Employee A at least [REDACTED] months before they did not select Complainant for the position [REDACTED]. Because Officials 1 and 5 both had knowledge of Complainant's protected disclosure and perceived protected activity, and the personnel actions occurred within temporal proximity to the disclosure and activity, OSC can establish a *prima facie* case of whistleblower retaliation. *See, e.g., Schnell*, 114 M.S.P.R. at 93; *Gonzalez*, 109 M.S.P.R. at 259.

In addition, although only knowledge and timing are needed to show causation, there is direct evidence that Complainant's whistleblowing was a contributing factor in the personnel actions. While considering Complainant's selection, Officials 1 and 5 discussed whether they could trust Complainant. [REDACTED]

B. NSF Cannot Show that Complainant Would Not Have Been Selected Absent his Protected Disclosure and Activity

Using the three *Carr* factors described above, NSF cannot meet the clear and convincing evidence standard. First, NSF does not have strong evidence to support Complainant's non-selection [REDACTED].⁸ For example, Complainant had a demonstrated record of success in the position, having served in that very position during the preceding three years. In the performance evaluations NSF provided, Official 1 gave Complainant the highest overall rating possible during his tenure. Official 1 also strongly commended Complainant's achievements in the selection memorandum he submitted to Official 5. Official 1 was so convinced that Complainant was the top candidate for the position that he unequivocally stated: "I feel that Complainant is the best candidate for this position" This is formidable evidence in favor of Complainant's selection.⁹

Officials 1 and 5 suggested the possibility that Complainant may have obtained information inappropriately played a role in Complainant's non-selection. Whatever role such speculation may have played, it is not strong evidence supporting NSF's personnel actions. Official 6 told OSC he did not know how Complainant obtained the information and that any theory that Complainant improperly got the information was "all conjecture." [REDACTED]

Furthermore, Official 1 wrote his memorandum recommending Complainant for the career position after he became aware that Complainant had obtained the information. This clearly indicates that the rank supposition Complainant acquired the information through improper means was of no significance. Instead, what is plausible is that Official 1 wanted to hire Complainant for the career position and he changed his mind after the meeting with Official 5 where they repeatedly discussed the tenuous issue of trust. [REDACTED]

Taking these things together, Official 1 altered his selection recommendation. In short, the "conjecture" about the information Complainant obtained and any related trust issues does not provide a strong basis to support the personnel actions. At best, it is a pretextual reason for whistleblower retaliation.

Finally, Official 1's late-developing preference for hiring someone outside of NSF does not provide strong evidence to support the personnel actions. His selection memorandum for Complainant does not mention the eventual selectee—an external candidate—as one of the two

⁸ Indeed, had NSF given Complainant the career appointment to the position as Official 1 initially recommended years earlier, it would not have been filling the position at this time. The vacancy occurred because of NSF's previous retaliation against Complainant, discussed above.

⁹ We also note that while Official 1 began preparing a selection memorandum for another internal candidate, this fact is of no moment as Official 1 neither finished it nor presented it to Official 5 for approval.

“highly-suited” candidates for the position. Nor is this external candidate listed as one of the two “highly-suited” candidates on another draft selection memorandum that Official 1 prepared. Indeed, Official 1 made his decision to recommend an external candidate only after NSF retaliated against Complainant for his whistleblowing and perceived protected activity. Additionally, hiring from the outside provided a good smokescreen to justify why Complainant was not selected. Thus, Official 1’s mere “gut” feeling that it would be better to hire an outsider is not clear and convincing evidence that NSF would have taken the same actions absent Complainant’s protected disclosure and activity. █

In terms of the second *Carr* factor, NSF had a motive to retaliate against Complainant. First, Complainant’s disclosure about Employee A caused disruption within NSF. Official 5 compared the upheaval following Complainant’s disclosure as “being hit by a mac truck,” and employees contacted Official 5 with their concerns. Official 3 stated that it “was a morale problem for sure.” In spite of the turmoil caused by employees targeting Complainant, NSF took no action to remind staff that employees, like Complainant, have a right to blow the whistle without fear of retaliation. While NSF may have had legitimate reasons for declining to publicly address █ decisions █, it could have taken action to protect Complainant without discussing these matters.

In addition, Complainant’s disclosure also caused NSF to receive unflattering attention outside of NSF. █

█ Official 5 received letters from individuals who had previously worked at NSF raising concerns, and Official 5 worried that the negative attention could spell trouble for NSF’s ability to recruit talent.

It is apparent that the actions of Officials 1 and 5 in not selecting Complainant for the position were motivated by a belief that replacing Complainant was the best way to deal with the disruption caused by his disclosure. Officials 1 and 5 referenced employees being “nervous” about Complainant. Even if NSF leadership was not personally angered by Complainant’s disclosure, the potential to improve morale by taking action against the person some and others staff blamed for the events that unfolded, provided a motive to retaliate. Thus, after multiple requests from within and outside of NSF for Complainant’s removal or replacement, Officials 1 and 5 essentially did so.

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█

Finally, in addressing the third *Carr* factor, NSF has not taken the same actions against similarly situated non-whistleblowers. NSF has not provided, nor has OSC's investigation revealed, any other instance at NSF in which a selecting official wrote and submitted a flattering appointment recommendation, and then changed that recommendation after meeting with a member of NSF's senior leadership.

In sum, weighing the *Carr* factors together, NSF cannot demonstrate by clear and convincing evidence that it would taken the same personnel actions absent Complainant's protected disclosure and activity.

III. CONCLUSION

For the foregoing reasons, OSC has reasonable grounds to believe that NSF violated section 2302(b)(8) and (b)(9) when NSF changed Complainant's first appointment from career to term. NSF also violated section 2302(b)(8) and (b)(9) when it later did not select Complainant for a supervisory position. [REDACTED]. As a result, Complainant is entitled to full corrective action to make him whole, which includes back pay, as well as consequential and compensatory damages. See 5 U.S.C. § 1221(g)(1)(A). We illustrate below some of the damages Complainant is entitled to in order to obtain *status quo ante* relief.

Complainant is entitled to lost wages. [REDACTED]

Complainant is also entitled to compensatory damages for the significant harm he experienced. As a preliminary matter, we note that Complainant's suffering was exacerbated because this was the second time NSF's retaliation had affected his ability to secure a supervisory position. [REDACTED]

As discussed, NSF leadership was aware of the vitriol and hostility directed at Complainant and did little to protect him. A year later, with conditions still tense for Complainant, NSF leadership compounded his suffering by not selecting him for the position he occupied, even though he had served in that position with distinction and his supervisor had initially recommended his selection. [REDACTED]

[REDACTED]

[REDACTED]

Additionally, Complainant suffered reputational harm.

[REDACTED]

[REDACTED]

Last, OSC requests that NSF leadership receive OSC-provided training on the prohibited personnel practices and the merit system principles to ensure that such violations as described herein do not occur again.